Tan Liang Chew & Ors v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 42–45 & 46 OF 1993
KC VOHRAH J
3 DECEMBER 1996

Criminal Law *— Criminal breach of trust — Breach of trust by an agent — Whether a director of a company was an agent who for purposes of s 409 of the Penal Code (FMS Cap 45) was entrusted in the way of his business as an agent — Whether a director of a company has dominion over property of the company*

The first accused was charged for the commission of two offences. The first charge was for the offence of criminal breach of trust punishable under s 409 of the Penal Code (FMS Cap 45) ('the Code'). The second charge was for the offence of cheating punishable under s 420 of the Code. The first accused was a director of Koperasi Kewangan Perindustrian Malaysia Bhd ('the society'). He also sat in the committee of the society ('the committee') that made recommendations to the Board of Directors of the society ('the board') to approve applications for housing loan. A housing loan application was purportedly made by one Tan Eng Hong ('PW2') who was not eligible for the housing loan as the house to be financed did not belong to him. The house belonged to the first accused.

PW2 had denied making the loan application but admitted that the loan application was signed by him after the application had been given to the officers of the society. Nevertheless the housing loan application purportedly made by PW2 was approved by the board. One Ngeow Yin Ngee ('PW3'), an advocate and solicitor who appeared to have agreed to be a guarantor, also denied that the signature in the form was his. A cheque for the loan amount applied for ('the cheque') was issued in favour of the society's solicitors, Messrs Ngeow & Co, even before the board sat to consider the application. The cheque was signed by all three accused.

PW3 gave evidence that he was instructed as solicitors by the first accused to use the money from the cheque received to pay the balance of the loan for a house that the first accused had bought earlier. The learned trial judge accepted the evidence of PW2 that he did not make the loan application. The evidence of PW3 that he did not agree to being a guarantor was also accepted by the learned trial judge. The learned judge found that the first accused was an agent of the society and that as a director he had dominion over the property of the society. Therefore when he signed the cheque without the approval of the board, he had committed breach of trust.

The second and third accused, who were co-signatories of the cheque, were charged for abetting the first accused in the commission of the offence of criminal breach of trust. The learned trial judge found that the fact that the second accused and the third accused had signed the cheque together despite having attended the meeting of

A the committee and being aware that the loan had not been approved by the board meant that they assisted the first accused in the commission of the criminal breach of trust.

All the accused were convicted of the charges against them. On appeal, the court had to consider inter alia, whether the first charge B against the first accused was valid. In this respect, the question was whether the first accused was an agent of the society and whether he had dominion over the property of the society. Consequently, the validity of the first charge against the first accused would affect the conviction of the second and third accused of the offence of abetment. With respect to the second charge against the first accused, the C deputy public prosecutor ('the DPP') conceded that it was bad in law because the charge specified that the cheating took place between 10 March 1984 and 17 April 1984 but the evidence showed that on 15 March 1984 the cheque for the loan sum had already been issued and delivered to PW3. In this respect, the court had to consider the D DPP's submission that the charge for cheating punishable under s 417 should be substituted instead.

Held, allowing the appeals:

(1) If a public servant is charged for criminal breach of trust under s 409 he would be charged with being entrusted with property or E with dominion over property 'in his capacity of a public servant'. If, however, an agent is charged he would be charged for being entrusted with property or with dominion over the property 'in the way of his business as ... (an) agent'. The first charge against the first accused charged him for being 'an agent of Koperasi F Kewangan Perindustrian Malaysia Bhd, to wit, as director and in such capacity entrusted with dominion over property ...'. Such a charge was clearly bad (see p 348F–G); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714, *Cooray v R* [1953] AC 407 and *Periasamy s/o Sinnappan v PP* [1996] 2 MLJ 557 followed.

G (2) The managing director of a company who either by his contract with his company or by general law, is entrusted with dominion over his company's property is not to be presumed to be falling within the terms of s 409 by reason of that fact alone. Although a managing director of a company has been held by the general law to be an agent of a company, he cannot upon that sole H consideration be held to be entrusted in the way of his business as an agent. Section 409, refers to person who are professional agents and not to casual agents, such as a company director. In this case, there was no evidence that the first accused was an agent of the society (see pp 348H–I and 349A–B); *Periasamy s/o Sinnappan v PP* [1996] 2 MLJ 557 followed.

I (3) In order to determine whether the man charged with the offence had dominion over the property and was entrusted with the money, oral evidence and documentary evidence need to be carefully looked at. The evidence produced was that the first

accused sat on a committee meeting as a member that recommended housing loan applications for approval by the board of directors and that he was a signatory with the other two accused of a cheque for an amount that was the subject matter of the charge. It would appear that the dominion over the property lied with the board since it had the power to approve housing loans (see p 349B–D).

(4) The evidence that the second and third accused had signed the cheque without verifying in the first place whether it could be done may amount to negligence on their part but was not sufficient to establish that they were dishonest. As the offence of criminal breach of trust against the first accused was not made out, the charge of abetment must necessarily fail (see p 349G–I).

(5) In hearing an appeal from a conviction, the power of the judge to alter a finding must be exercised subject to ss 166 and 167 of the Criminal Procedure Code (FMS Cap 6) and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made at or established in the court below. As there was no evidence that the committee members or the board members were deceived, it did not warrant a substitution of the charge to one of simple cheating (see p 352A–B); *Sivalingam v PP* [1982] 2 MLJ 172 followed.

[Bahasa Malaysia summary

Tertuduh pertama telah dituduh dengan dua kesalahan. Tuduhan pertama adalah untuk kesalahan pecah amanah jenayah yang boleh dihukum di bawah s 409 Kanun Keseksaan (NMB Bab 45) ('Kanun tersebut'). Tuduhan kedua adalah untuk kesalahan penipuan yang boleh dihukum di bawah s 420 Kanun tersebut. Tertuduh yang pertama adalah pengarah Koperasi Kewangan Perindustrian Malaysia Bhd ('kesatuan tersebut'). Dia juga duduk di dalam Jawatankuasa kesatuan tersebut ('Jawatankuasa tersebut') yang mempunyai kewajipan untuk membuat syor kepada Lembaga Pengarah kesatuan tersebut ('Lembaga tersebut') apa-apa permohonan untuk kelulusan pinjaman perumahan. Satu permohonan untuk pinjaman perumahan telah dikatakan dibuat oleh seorang bernama Tan Eng Hong (PW2) yang tidak layak untuk pinjaman perumahan kerana rumah yang akan dibiayai bukanlah rumah PW2 tetapi adalah rumah Tertuduh Pertama. PW2 telah menafikan yang permohonan tersebut telah dibuat oleh beliau tetapi telah mengaku bahawa permohonan tersebut telah ditandatangani olehnya selepas permohonan tersebut diberi kepada pegawai kesatuan tersebut. Walau bagaimanapun, permohonan pinjaman perumahan tersebut telah diluluskan oleh Jawatankuasa tersebut. Satu Ngeow Yin Ngee (PW3), seorang peguambela dan peguamcara yang dikatakan telah bersetuju untuk menjadi penjamin, juga telah menafikan yang tandatangan di atas borang yang berkenaan adalah tandatangannya. Cek untuk jumlah pinjaman yang dipohon telah dikeluarkan kepada Tetuan Ngeow &

Co sebelum Jawatankuasa menimbang permohonan tersebut. PW3 memberi keterangan bahawa dia telah diarahkan oleh tertuduh pertama untuk menggunakan wang daripada cek yang berkenaan untuk membayar baki pinjaman yang didapatkan untuk rumah yang tertuduh pertama telah beli sebelum daripada itu. Hakim perbicaraan telah menerima keterangan PW2 bahawa dia tidak membuat permohonan untuk pinjaman tersebut. Keterangan PW3 bahawa dia tidak bersetuju untuk menjadi penjamin juga diterima oleh hakim perbicaraan. Hakim perbicaraan telah mendapati bahawa pertuduh pertama adalah ejen kesatuan tersebut dan sebagai pengarah mempunyai kuasa ke atas harga kesatuan tersebut. Maka apabila dia menandatangani cek tersebut tanpa kelulusan Lembaga tersebut, dia telah melakukan kesalahan pecah amanah jenayah. Tertuduh kedua dan ketiga juga merupakan penandatangan kepada cek tersebut dan telah dituduh untuk kesalahan bersubahat dengan tertuduh pertama dalam melakukan kesalahan pecah amanah jenayah dan boleh dihukum di bawah ss 109 dan 409 Kanun tersebut. Hakim perbicaraan mendapati bahawa hakikat yang tertuduh kedua dan ketiga telah menandatangani cek tersebut bersama walaupun mereka hadir di mesyuarat Jawatankuasa tersebut dan sedar bahawa pinjaman tersebut belum diluluskan oleh Jawatankuasa tersebut bermakna yang mereka telah menolong tertuduh pertama dalam melakukan kesalahan pecah amanah jenayah. Kesemua tertuduh telah disabitkan menurut tuduhan terhadap mereka. Atas rayuan mahkamah perlu menimbangkan, antara lain, sama ada tuduhan pertama terhadap tertuduh pertama adalah sah. Berhubungan dengan ini persoalan adalah sama ada tertuduh pertama adalah ejen kesatuan tersebut dan sama ada beliau mempunyai kuasa ke atas harta kesatuan tersebut. Justeru itu keesahan tuduhan pertama terhadap tertuduh pertama akan mempunyai kesan terhadap persabitan tertuduh kedua dan ketiga untuk kesalahan persubahatan. Berhubung dengan tuduhan kedua terhadap tertuduh pertama, timbalan pendakwa raya ('TP') mengakui bahawa ianya adalah salah di sisi undang-undang kerana tuduhan tersebut menyatakan bahawa penipuan tersebut dilakukan di antara 10 Mac 1984 dan 17 April 1984 tetapi keterangan menunjukkan bahawa pada 15 Mac 1984, cek untuk jumlah pinjaman telah dikeluarkan dan dihantar kepada PW3. Sehubungan dengan itu, mahkamah dikehendaki mempertimbangkan hujahan TP untuk menggantikan tuduhan kedua terhadap tertuduh pertama dengan satu tuduhan penipuan yang boleh dihukum di bawah s 417 Kanun tersebut.

Diputuskan, membenarkan rayuan kesemua tertuduh:

(1) Sekiranya seorang pengkhidmat awam dituduh untuk kesalahan pecah amanah jenayah di bawah s 409 Kanun tersebut, dia akan dituduh dengan diamanahkan dengan harta atau dengan diperkuasakan dengan harta 'dalam keupayaannya sebagai pengkhidmat awam'. Walau bagaimanapun, sekiranya seorang ejen dituduh, dia akan dituduh dengan diamanahkan dengan harta atau dengan diperkuasakan dengan harta 'di dalam

perjalanan kegiatannya sebagai ... (seorang) ejen'. Tuduhan pertama terhadap tertuduh pertama adalah sebagai 'seorang ejen Koperasi Kewangan Perindustrian Malaysia Bhd, sebagai pengarah dan dalam kedudukan sedemikian mempunyai kuasa terhadap harta ...'. Tuduhan sedemikian jelas adalah salah (lihat ms 348F–G); *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 dan *Cooray v R* [1953] AC 407 diikut.

(2) Pengarah pengurusan sesebuah syarikat yang sama ada melalui kontraknya dengan syarikat tersebut atau dari segi undang-undang umum, mempunyai kuasa ke atas harta syarikat itu tidak boleh dianggap sebagai jatuh di bawah peruntukan s 409 Kanun tersebut hanya berdasarkan hakikat itu sahaja. Walaupun seorang pengarah pengurusan syarikat pernah diputuskan menurut undang-undang umum sebagai seorang ejen syarikat, dia tidak boleh, atas pertimbangan tersebut sahaja, didapati diamanahkan di dalam perjalanan kegiatannya sebagai ejen s 409 merujuk kepada seseorang yang merupakan ejen profesional dan bukan kepada ejen yang kasual, seperti pengarah syarikat. Tiada keterangan yang menunjukkan bahawa tertuduh pertama adalah ejen kesatuan tersebut (lihat ms 348H–I dan 349A–B).

(3) Untuk memastikan sama ada seseorang yang dituduh dengan kesalahan tersebut mempunyai kuasa ke atas harta dan telah diamanahkan dengan wang, keterangan lisan dan dokumentar perlu dilihat dengan teliti. Keterangan yang dikemukakan adalah bahawa tertuduh pertama telah duduk di dalam mesyuarat Jawatankuasa tersebut sebagai seorang ahli dan telah membuat syor berkenaan dengan pinjaman perumahan untuk kelulusan Lembaga tersebut dan bahawa dia bersama dengan dua tertuduh yang lain adalah penandatangan cek untuk jumlah yang menjadi subjek tuduhan tersebut. Daripada keterangan yang dikemukakan, kuasa ke atas harta adalah di dalam tangan Lembaga tersebut kerana ia mempunyai kuasa untuk meluluskan pinjaman perumahan (lihat ms 349B–D).

(4) Keterangan tertuduh kedua dan tertuduh ketiga bahawa cek tersebut telah ditandatangani tanpa pengesahan sama ada ianya boleh dikeluarkan mungkin suatu tindakan yang cuai tetapi tidak mencukupi untuk membuktikan bahawa mereka tidak jujur. Oleh kerana kesalahan pecah amanah jenayah terhadap tertuduh pertama tidak dapat dibuktikan, maka tuduhan persubahatan semestinya juga gagal (lihat ms 349G–I).

(5) Dalam mendengar rayuan daripada suatu persabitan, kuasa hakim yang bekenaan untuk menukar pendapat mahkamah mesti dijalankan menurut ss 166 dan 167 Kanun Acara Jenayah (NMB Bab 6) dan untuk membolehkan suatu penggantian, keterangan jelas untuk menyokong atau menunjukkan bahawa tuduhan yang hendak diganti dapat dibuktikan di mahkamah perbicaraan adalah perlu. Oleh kerana tiada keterangan bahawa ahli Jawatankuasa tersebut atau ahli Lembaga tersebut telah

ditipu, maka tiada alasan untuk menggantikan tuduhan tersebut (lihat ms 352A–B); *Sivalingam v PP* [1982] 2 MLJ 172 diikut.]

Notes

For cases on s 409 of the Penal Code, see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1197–1219.

Cases referred to

Chang Lee Swee v PP [1985] 1 MLJ 75 (refd)
Cooray v R [1953] AC 407 (folld)
Periasamy s/o Sinnappan v PP [1996] 2 MLJ 557 (folld)
Sivalingam v PP [1982] 2 MLJ 172 (folld)
Yap Sing Hock & Anor v PP [1992] 2 MLJ 714 (folld)

Legislation referred to

Co-operative Ordinance 1948 s 9
Criminal Procedure Code (FMS Cap 6) ss 166, 167
Penal Code (FMS Cap 45) ss 109, 409, 415, 417, 420

Appeal from: Kes Tangkap No 62–123 of 1989 and 62–124 of 1989 (Sessions Court, Kuala Lumpur)

Jeffrey Fernandez (*Fernandez & Co*) for the first appellant.
V Balasingam (*Balasingam & Co*) for the second appellant.
Mah Weng Kwai (*Mah Weng Kwai & Associates*) for the third appellant.
Mohd Yusof bin Hj Zainal Abidin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

KC Vohrah J: This is the peculiar case of a man (the first accused) who was eligible to obtain a loan from Koperasi Kewangan Perindustrian Malaysia Bhd ('the society') — where he was a director — to buy his house, but who did not apply for such a loan. Instead, there was a loan application for the purchase of the house which appeared to have been made by a member named Tan Eng Hong (PW2). PW2 was not eligible for the loan as the house was not his. A committee of the society that had a duty to recommend to the Board of Directors to approve housing loans, however, recommended the application and the committee comprised — among other members — the first accused, the second accused and the third accused. On the day the committee recommended the housing loan and even before the board had sat to consider the application, a cheque was issued for the loan amount applied for and it was signed by all three accused. The cheque was encashed and the money was applied towards the purchase price the first accused had to make on the house.

It was the prosecution's case that the first accused was a director of the society and in such capacity was entrusted with the loan amount and that he had committed breach of trust of that amount. It was the

prosecution's case that the second and third accused abetted the first accused on the commission of the criminal breach of trust.

Further, the prosecution charged that the first accused cheated the society by deceiving certain officers of the society into believing that an application for the loan had been made by PW2 and that another person (PW3) had agreed to act as one of the guarantors for the repayment of the loan when PW2 had not made the application and PW3 had not agreed to be included as one of the guarantors.

The first accused — Charges of CBT by agent and of cheating

The first accused was charged with the two offences, criminal breach of trust ('CBT') by an agent and cheating thus:

> The first charge:
>
> That you on or about 15 March 1984, in the Federal Territory of Kuala Lumpur, being an agent of Koperasi Kewangan Perindustrian Malaysia Bhd, to wit, as director and in such capacity entrusted with dominion over certain property, to wit, RM350,000 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s 409 of the Penal Code (FMS Cap 45).
>
> The second charge:
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> That you between 10 March 1984 and 17 April 1984, at No 1A, Jalan Jejaka 2, Taman Maluri, in the District of Cheras, in the Federal Territory of Kuala Lumpur did cheat Koperasi Kewangan Perindustrian Malaysia Bhd ('KKPMB'), to wit, by deceiving certain officers of KKPMB into believing that an application for a loan had been made by one Tan Eng Hong and that one Ngeow Yin Ngee had agreed to act as one of the guarantors thereto when in actual fact the said Tan Eng Hong did not make such an application and neither did the said Ngeow Yin Ngee agree to be included as one of the guarantors, and thereby dishonestly induced KKPMB to approve the said loan resulting in the delivery of a cheque for the sum RM350,000 to Messrs Ngeow & Co, which was put to your own use and that you have thereby committed an offence punishable under s 420 of the Penal Code (FMS Cap 45).

The second and third accused — Abetment of CBT by the first accused

Lee Ah Kow ('the second accused') and Gan Wah Siong ('the third accused') were charged for abetting the first accused in the commission of the breach of trust thus:

> That you jointly on or about 15 March 1984, at No 1A, Jalan Jejaka 2, Taman Maluri, in the District of Cheras, in the Federal Territory of Kuala Lumpur abetted the commission of the offence of criminal breach of trust of certain property, to wit, RM350,000 belonging to Koperasi Kewangan Perindustrian Malaysia Bhd, by one Tan Liang Chew which offence was committed in consequence of your abetment and that you have thereby committed an offence punishable under ss 109 and 409 of the Penal Code (FMS Cap 45).

A *The prosecution's case*

At the joint trial of all the accused, the first accused was found guilty of the two offences he was charged with and sentenced to five years' and three years' imprisonment respectively, the sentences to run concurrently. There must be a mistake in the trial judge's grounds of decision as regards the B finding of guilt of the other two accused. She said that she found the second and third accused guilty on two offences (more about this later) but at the end of her grounds, she said that each of them was sentenced to three years' imprisonment, but for which offence?

The society was established on 22 August 1979 under s 9 of the Co-C operative Ordinance 1948.

During the relevant period within which the alleged offences were committed, the first accused was a director and deputy chairman of the society while the second accused was the Honorary Secretary. The third accused was the Honorary Treasurer.

D It was the case of the prosecution that although there appeared to be a loan application (P4 and P5) made by PW2 tabled before the Financial and Investment Committee of the society ('the committee') on 15 March 1984, PW2 did not in fact make such an application. The learned judge uncritically accepted the evidence of PW2 that he did not make such an application although PW2 did, under cross-examination, admit that he E signed the loan applications (P4 and P5) but stated that it was about a month or two after the application had been given to the officers of the society. He said that he was prevailed upon by officers of the society to sign P4 and P5. In the application, one Ngeow Yin Ngee (PW3), an advocate and solicitor appeared to have agreed to be a guarantor. He denied the F signature in the form was his but agreed the handwriting was similar to his and that it was possible it was his writing 'but I deny it is mine'. It was the prosecution's case that PW3 did not agree to his being the guarantor and this too appeared to be accepted by the learned judge.

It was the case of the prosecution that the first accused deceived the committee that the application was genuine.

G

The evidence showed that the committee did not have the power to approve any housing loan. In any event, the house was the first accused's and was not for PW2's residence. The committee could, however, recommend an eligible housing loan to the board of directors for approval. At the meeting on 15 March 1984, the committee recommended the loan H application for approval by the board of directors.

It was the case of the prosecution that the board approved the bogus loan application on 17 April 1984 but that very much earlier, on 15 March 1984, the loan amount had already been issued through a cheque for RM350,000 and the cheque was signed by all three accused as signatories.

I In respect of a cheque issued by the society, it needed three signatures. The first, second and third accused and a few others were signatories. The second accused was a compulsory signatory.

The cheque was issued in favour of the society's solicitors, Messrs Ngeow & Co. It was the case of the prosecution that the money was converted to the use of the first accused. The evidence showed it was applied principally towards the purchase of the first accused's house after deductions made by Messrs Ngeow & Co.

The learned judge accepted PW3's statement that he was instructed by the first accused to use the money to pay the balance he owed on a loan for a house he had bought earlier and that he did that after deducting the amount he had advanced for the accused for the purchase of that house. PW3 said that when he received the cheque (P3), it did not mention the name 'Tan Eng Hong' and because of that he did not know whether the cheque was for PW2. He said he did not know when the first accused gave him the instruction to make payment for the house he had made, but he accepted it as an instruction from the society as the first accused was a director of the society.

The case against the first accused on the CBT charge

The learned judge did not evaluate the evidence of the witnesses, that of especially PW3 and PW4 (who were members of the society who gave evidence) or the lack of evidence relating to the preparation of the loan application, the preparation and issue of the cheque and the voucher connected with the amount of RM350,000 for the loan, the presentation of the loan application at the meeting of the committee on 14 March 1984, the role that all the accused played in that meeting and the preparation of the loan documentation. The learned judge said that at the close of the prosecution's case, the prosecution had proved beyond a reasonable doubt that the first accused was an agent of the society — that as a director of the society, he had dominion over the property of the society and in this case he had signed the cheque for RM350,000 on 15 March 1984 although there was no approval by the board of directors and that he had committed breach of trust of the money. Lastly, she stated that the accused had signed the cheque when the condition of the society which was that the approval of the board of directors had to be obtained in the first place had not been obtained.

The case against the second and third accused on abetment of CBT

The learned trial judge said that the fact that the second and third accused attended the meeting of the committee on 15 March 1984 and that they were aware that the loan had not been approved by the board of directors and that nevertheless they signed the cheque together with the first accused meant that they assisted the first accused in committing the criminal breach of trust.

The case against the first accused on cheating charge

The learned trial judge found that the first accused had deceived officers of the society by stating that PW2 had made a housing loan application when the money was released to PW3 for his own use. She also stated that PW2 had denied that he had made the loan application and PW3 denied

A that he agreed to be a guarantor for PW2 for the loan. The learned trial judge stated that although there was no evidence that the first accused had induced the officers at the meeting of the committee on 15 March 1984 and the board of directors, it could be believed and considered that the first accused had power and influence over other officers and had induced them to deliver the property.

B

The defence and the trial judge's decision

The first accused — Charges of CBT and cheating

The learned trial judge, in respect of the first accused and the charge of C criminal breach of trust by an agent against him, stated that the defence was that the cheque was issued openly and that the loan application was made by PW2 but said that this went against the evidence of PW2 that he did not make the loan application. She also stated that the first accused had stated that the cheque was for PW2 as a loan and was paid to PW3 as D stakeholder but she rejected this by saying PW3 never stated that that he knew the money was for PW2. The learned judge was of the view that the deputy public prosecutor ('the DPP') had proved his case beyond a reasonable doubt, that the first accused had not raised any reasonable doubt on the prosecution's case and she found him guilty and convicted the first accused on the first charge.

E In respect of the second and third accused and the charge against them of abetment of criminal breach of trust by an agent against the first accused, she observed that the second accused as secretary and the third accused as treasurer of the society were persons who had been given power to sign the cheque. Without the signature of these two and that of the first F accused, the offence by the first accused would not have been committed. She said that both attended the meeting of the committee on 15 March 1984 and they knew on that day the loan application before them had not been approved by the board of directors, yet they signed the cheque and this showed that they deliberately assisted the first accused to commit breach of trust.

G She rejected the defence of the second and third accused that they had pre-signed the cheque and said that it was very doubtful; they were signatories to the cheque and having regard to their educational level, it was believed that both should have known that it was not right to do such things. She considered that the DPP had proved his case beyond a reasonable doubt on H both charges ('dalam kedua-dua tersebut').

In respect of the first accused in relation to the charge of cheating, she stated that although there was no direct evidence to show that the accused had induced the officers at the meeting of 15 March 1984 of the committee or the board of directors at their meeting on 17 April 1984, I there was evidence that he had an interest in the loan and that he used the money. Because of this, it can be believed and considered that the accused as director who had power and influence over other officers dishonestly induced and deceived them. The first accused had dishonest intentions when he received the payment made by an officer of the society. When the

payment was made, he knew the agreement had not been stamped and the house paid for was bought by him and not by PW2. Because of these, she said, the court was of the view that the DPP had proved his case beyond a reasonable doubt on the charge and she found the first accused guilty and convicted him.

The law

CBT by an agent

It is a curious feature of her conclusion on the case that she found that the DPP had proved his case on each of the charges against the three accused, not that the three accused had not raised a reasonable doubt on the prosecution's case on the charges (except for the one on the offence of CBT). It has to be noticed that there were several places in her judgment where she gave the impression that the second and third accused faced two charges. One other aspect which I had noted earlier is that there was no attempt to evaluate the evidence of PW2 and PW3, let alone the other witnesses, in the light of the answers they gave under cross-examination and the evidence of all the accused and in the absence of evidence as to crucial matters.

The lack of proper evaluation of evidence apart, what is more important is the issue of the validity of the charge relating to criminal breach of trust by an agent. I requested counsel to study the recent Court of Appeal case of *Periasamy s/o Sinnappan v PP* [1996] 2 MLJ 557 and to consider the validity of the first charge against the first accused and the charge against the second and third accused.

If a public servant is charged for criminal breach of trust under s 409, he would be charged with being entrusted with property or with dominion over property 'in his capacity of a public servant'. If, however, an agent is charged, he would be charged for being entrusted with property or with dominion over the property 'in the way of his business as ... (an) agent'.

The first charge against the first accused charges him for being 'an *agent* of Koperasi Kewangan Perindustrian Malaysia Bhd, to wit, as director *and in such capacity* entrusted with dominion over property ...'. As was pointed out by Gopal Sri Ram JCA in *Periasamy* (at p 575) following the (then) Supreme Court case of *Yap Sing Hock & Anor v PP* [1992] 2 MLJ 714 and *Cooray v R* [1953] AC 407, such a charge is clearly bad.

In any event, there was no evidence adduced to show that the first accused had dominion over the property of the society. As was pointed out by Gopal Sri Ram JCA in *Periasamy* at p 575:

> By way of illustration, the managing director of a company who, either by his contract with his company or by general law, is entrusted with dominion over his company's property is not to be presumed to be falling within the terms of s 409 by reason of that fact alone. A managing director of a company has, no doubt, been held by the general law to be an agent of the company, but he cannot, upon that sole consideration, be held to have been entrusted in the way of his business as an agent. In other words, the section refers — as was contended at the bar of the Privy Council in *Cooray* — to

A persons who are professional agents and not to casual agents, such as a company director.

The first accused was a director of the society, but so were many others. What was the special role that he had? Where was the evidence that he was an agent of the society? There was no evidence at all that he was an agent
B of the society.

It has been pointed out in *Chang Lee Swee v PP* [1985] 1 MLJ 75 that one has to look carefully at the oral and documentary evidence to see if indeed the man charged for the offence had dominion over the property and was entrusted with the money; and here neither the oral nor
C documentary evidence show that the first accused was so entrusted with the money. There was no evidence to show that he had dominion over the money of the society. The evidence that was produced was that he sat on a committee meeting as a member that recommended housing loan applications for approval by the board of directors and that he was a signatory with the second and third accused of a cheque for an amount
D that is the subject matter of this charge. If at all, the dominion over the property appears to that of the board of directors since it had the power to approve housing loans. The evidence may well show a lax environment for the processing of loan applications and of financial procedures and management but that is not the same as saying the first accused had
E dominion over the property.

In the circumstances, the first charge was not made out at the close of the prosecution's case. No issue of simple criminal breach of trust under s 406 arises as well.

The appeal by the first accused against conviction and sentence on
F the first charge is allowed and he is therefore acquitted and discharged.

Abetment

As for the second and third accused on their charge of abetment of the criminal breach of trust offence by the first accused, En Mohd Yusof
G argued that the prosecution's case was that these two had signed the cheque and it was abetment by intentionally aiding the criminal breach of trust; by signing the cheque without verifying in the first place whether it could be done (assuming they had pre-signed the cheques), they voluntarily signed over the dominion of the property. With respect, it may amount to negligence on the part of each of the two for pre-signing cheques but it
H does not mean each of them was dishonest. There will have to be more than just that evidence to establish that. In any event, the simple offence of criminal breach of trust was not made out against the first accused and that means the charge of abetment against the second and third accused must necessarily fail. The appeal by them on their conviction and sentence
I is allowed.

Cheating

The DPP En Mohd Yusof with his usual fairness had conceded that the charge of cheating against the first accused under s 420 as it stands is bad

in law. The reason is simple. The charge specifies that cheating took place between 10 March 1984 and 17 April 1984 but the evidence showed that on 15 March 1984 an amount of RM350,000 belonging to the society had already been issued by cheque and delivered to PW3. On the other hand, the learned DPP argued that a charge of cheating punishable under s 417 should be substituted. The argument is attractive.

Section 417 of the Penal Code (FMS Cap 45) is the punishable section for an offence of cheating under s 415 which reads:

> 415 Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, is said to 'cheat'.
>
> Explanation 1 — A dishonest concealment of facts is a deception within the meaning of this section.

The DPP's submission, if I understand him correctly, is this. The committee was deceived by the application for a housing loan for RM350,000. Although the loan application was in the name of PW2, PW2 in fact did not apply for the loan and the loan was for a house that belonged to the first accused and PW3 had not agreed to be a guarantor in respect of the loan.

The evidence of PW4, the chairman of the committee (in the notes of proceedings his name appears as Lim Tat Wee while the record of the meeting of 15 March 1984 (P15) states the name as Michael Lim Tat Ooi), is that the first accused attended the meeting but that he did not know which person it was who presented the loan application. He said that he knew that the finance department prepared a number of applications for loans and PW2's name was included as one of them and that the meeting had approved his application. He was not sure if he saw PW2's file. He said that he attended the meeting of the board of directors on 17 April 1984 (see P16A) and the loan application was approved there although he did not know that the amount had already been disbursed.

It is unfortunate that the loan officer in the Loans Department of the society, Chin Tai Lian (who, according to the former general manager of the society, PW10 is related to the first accused) could not be found to give evidence as to who instructed her to put up the loan application for the committee, who processed the loan application of PW2 in the office, whether it was signed or whether it was complete. According to PW5, Phang Ah Teck, the assistant general manager of the society at the relevant period, normally the loan officer would present the loan application to the chairman of the meeting of the committee for consideration. There was no evidence, not even from PW10, as to who prepared or processed the cheque and the connected voucher.

True, PW2 had said that he had not signed the second loan application (P4) but under cross-examination he admitted that he signed the application but later said that he was forced to do it. As for the evidence of PW3, he

A said that he did not give his name as guarantor yet he prevaricated on the authenticity of his handwriting in the application form and he sat on the board of directors that approved the said loan application and his name appeared as guarantor! In any event, if what PW2 and PW3 had stated is true, their statements by themselves still do not go to show that the first accused was the one who dishonestly induced the officers of the society.

B

But even assuming the loan form was not signed by PW2 as PW2 alleged, and that PW3 did not stand as guarantor as PW3 alleged, the fact remains that one particular in the form (P4) gave the address of the house for which the loan was sought as 'No 25, Jalan Setia Raya, Bukit Damansara, Kuala Lumpur'; and at the meeting of the committee on 15 March 1984,

C the first accused knew that the house was his (the first accused's) house. There was an eligibility for a housing loan if the house was for one's own residence. At the meeting, the first accused knew that the particular in the application form was false.

On 15 March 1984, at the meeting of the committee, it can be

D assumed that the first accused intentionally omitted to draw attention of the members of the committee present that the application by PW2 contained a false particular relating to the house the loan was applied for, that the house was actually the first accused's house and not that of PW2 and therefore PW2 was not eligible for the loan application he sought.

E The committee, however, is not a single legal entity. And it was the prosecution's case that the second and third accused were abetting the first accused in the CBT (meaning that they were aware of this omission) and it was in evidence that the second and third accused were members in attendance at the committee meeting. It was the prosecution's contention that by their attendance at the meeting and signing of the cheque, they had

F abetted the first accused in the criminal breach of trust offence. How then do I treat this aspect of the case that they therefore knew the loan application contained a false particular? If so, they were not deceived. Of the other members, Lim Tock Ooi (PW4) gave evidence and his evidence appeared to be that he was unaware of the false particular. What about the other

G members? Were they aware of the false particular? And in spite of that, they recommended approval? There was no evidence one way or the other. I do not think in the circumstances it can be said the committee which made the recommendation had been deceived. I also have difficulty in drawing from the evidence those elements which go to show that the omission caused or was likely to cause to the committee members damage

H or harm in body, mind or reputation to satisfy the last ingredient of the offence of simple cheating.

If we shift our attention to the board meeting on 17 April 1984, it will be the same considerations that would apply as regards the false particular about the house. Can it be said apart from the chairman, PW8 (who

I appeared to be unaware of the false particular), the first, second and third accused (who the prosecution say were aware) and PW4 (who appeared to be unaware), the other members were aware? There is no evidence to that effect and in the circumstances, it cannot be said that the board members were cheated.

In *Sivalingam v PP* [1982] 2 MLJ 172, it was held that in hearing an appeal from a conviction, the power of the judge to alter a finding must be exercised subject to ss 166 and 167 of the Criminal Procedure Code (FMS Cap 6) and to warrant a substitution there must be clear evidence that a case for the substituted offence would have been made at or established in the court below. In our case, there is no such evidence.

In all the circumstances of the cases, all charges must fail. I also do not see enough evidence to substitute a charge of simple cheating against the first accused. I allow the appeals and set aside the sentences on all the charges.

Appeals allowed.

Reported by Pearl Wee